

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

IN RE	)	Bankruptcy Case
	)	No. 13-60365-fra7
STEPHEN WELCH and ANNETTE WELCH,	)	
	)	
Debtors.	)	
_____	)	Adversary Proceeding
DONALD McEDWARDS, individually, as	)	No. 13-6032-fra
Beneficiary of his self-directed IRA, as	)	
Beneficiary of the TMG Solo K. Plan, and as	)	
Beneficiary of the TMG Trust Defined Benefit	)	
Plan,	)	
	)	
Plaintiff,	)	
vs.	)	
STEPHEN A. WELCH,	)	MEMORANDUM OPINION
	)	
Defendant.	)	
_____	)	

Plaintiff filed his complaint against Debtor/Defendant, objecting to the dischargeability of his debt and thereafter filed a motion for summary judgment, to which the Defendant did not respond. The Court finds that this matter is appropriate for adjudication without hearing, and for the following reasons finds for Plaintiff.

FACTS

Defendant and his spouse filed a chapter 7 bankruptcy petition and, prior to the entry of discharge, the Plaintiff filed a timely complaint seeking a judgment declaring that a default money judgment obtained by

1 Plaintiff in the Superior Court of California for Mendocino County is excepted from the bankruptcy  
2 discharge. An answer was filed by Defendant denying the substantive allegations of the complaint. Plaintiff  
3 thereafter filed an amended complaint and a motion for summary judgment declaring the debt  
4 nondischargeable under 11 U.S.C §§ 523(a)(2)(A) and 523(a)(4).

### 5 SUMMARY JUDGMENT

6 Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories,  
7 admissions, and affidavits, if any, show that there is no genuine issue of material fact and the moving party is  
8 entitled to judgment as a matter of law. Fed. R. Civ. P. 56, made applicable by Fed. R. Bankr. P. 7056. The  
9 movant has the burden of establishing that there is no genuine issue of material fact. Celotex Corp. v.  
10 Catrett, 477 U.S. 317, 323 (1986). The court must view the facts and draw all inferences in the light most  
11 favorable to the nonmoving party. T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n, 809 F.2d 626, 630-  
12 31 (9<sup>th</sup> Cir. 1987). The primary inquiry is whether the evidence presents a sufficient disagreement to require  
13 a trial, or whether it is so one-sided that one party must prevail as a matter of law. Anderson v. Liberty  
14 Lobby, Inc., 477 U.S. 242, 247 (1986).

15 A party opposing a properly supported motion for summary judgment must present affirmative  
16 evidence of a disputed material fact from which a factfinder might return a verdict in its favor. Anderson v.  
17 Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). Bankruptcy Rule 7056, which incorporates Federal Rule of  
18 Civil Procedure 56(e), provides that the nonmoving party may not rest upon mere allegations or denials in the  
19 pleadings, but must respond with specific facts showing there is a genuine issue of material fact for trial.  
20 Absent such response, summary judgment shall be granted if appropriate. See Celotex Corp. v. Catrett, 477  
21 U.S. 317, 326-27 (1986).

### 22 DISCUSSION

#### 23 A. The Default Judgment

24 The default judgment entered in Mendocino County (Default Judgment) in favor of Plaintiff herein  
25 and against Defendant states that “after evidence having been considered by the Court, the Court finds that as  
26 to each and every cause of action in the complaint and as set forth in Plaintiff McEdwards’ Application for

1 Default Judgment, Defendant Stephen Alan Welch committed actual fraud proximately causing damage to  
2 McEdwards in the following amounts as to the following named transaction:" The judgment then lists a  
3 series of loan transactions with principal and accrued interest totaling \$1,830,048.57. The money judgment  
4 was entered in that amount.

5 B. Collateral Estoppel / Issue Preclusion

6 Collateral estoppel is the doctrine barring a party from relitigating an issue determined against that  
7 party in an earlier action. Black's Law Dictionary 712 (8th ed. 2004). In West Coast Theater Corp. v. City  
8 of Portland, 897 F.2d 1519, 1525 (9th Cir. 1990), the Ninth Circuit stated:

9 It is now settled that a federal court must give to a state court judgment the same  
10 preclusive effect as would be given that judgment under the law of the state in which the  
11 judgment was rendered. Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 81,  
104 S.Ct. 892, 896, 79 L.Ed. 2d 56 (1984); accord Clark v. Yosemite Community College  
11 Dist., 785 F.2d 781, 784 (9th Cir. 1986); see also 28 U.S.C. § 1738.

12 Thus, in determining whether collateral estoppel applies, the bankruptcy court must look to the law of  
13 issue preclusion in the state where the judgment sought to be given preclusive effect was initially entered - in  
14 this case California.

15 In California, there are five threshold requirements for application of collateral estoppel:

- 16 (1) the issue sought to be precluded from relitigation must be identical to that decided in the  
17 former proceeding,  
18 (2) this issue must have been actually litigated in the former proceeding,  
19 (3) it must have been necessarily decided in the former proceeding,  
20 (4) the decision in the former proceeding must be final and on the merits, and  
21 (5) the party against whom preclusion is sought must be the same as, or in privity with, the  
22 party to the former proceeding.

23 Harmon v. Kobrin (In re Harmon), 250 F.3d 1240 (9th Cir. 2001).

24 In order to establish fraud under 11 U.S.C. § 523(a)(2)(A), a creditor must prove by a preponderance  
25 of the evidence the following five elements: (1) the debtor made a material misrepresentation, (2) with  
26 knowledge of its falsity, (3) with the intent to deceive, (4) on which the creditor justifiably relied, and (5) due

1 to which the creditor sustained loss or damage. In re Kirsh, 973 F.2d 1454, 1457 (9th Cir. 1992). In the State  
2 Court complaint, the Plaintiff adequately alleged facts that would satisfy the elements under § 523(a)(2)(A).  
3 The complaint alleges that Defendant was acting as Plaintiff's agent in a fiduciary capacity and had a  
4 confidential relationship with him as a result of Plaintiff's trust and confidence in Defendant's honesty and  
5 integrity as a real estate professional. From this one can assume that any reliance in Defendant by Plaintiff  
6 was justified under the circumstances. Money was transferred from Plaintiff to Defendant, relying on the  
7 Defendant's representations that Plaintiff would obtain promissory notes and deeds of trust; Defendant made  
8 those representations knowing they were false and with the intention of deceiving Plaintiff; based on  
9 Plaintiff's reliance on those misrepresentations he sustained losses in the amounts alleged. Moreover, those  
10 issues must have been necessarily decided in the State Court proceeding to obtain the judgment of actual  
11 fraud.

12 The above satisfies the threshold requirements for collateral estoppel in California courts, with the  
13 exception of the "actually litigated" element. In California, "[a] default judgment is an estoppel as to all  
14 issues necessarily litigated therein and determined thereby exactly like any other judgment." Williams v.  
15 Williams (In re Williams Estate), 36 Cal.2d 289, 223 P.2d 248, 252 (1950). Two limitations were placed on  
16 this rule, however. First, it must be shown that the defendant "has been personally served with summons or  
17 has actual knowledge of the existence of the litigation." Id. at 254. Second, an issue may have preclusive  
18 effect "only where the record shows an express finding upon the allegation." Id. at 252. "However, 'the  
19 express finding requirement can be waived if the court in the prior proceeding necessarily decided the  
20 issue'." In re Biring, 2012 WL 370877, p. 5 (9th Cir. BAP 2012)(citing Cantrell v. Cal-Micro, Inc. (In re  
21 Cantrell, 329 F.3d 1119, 1124 (9th Cir. 2003)).

22 Plaintiff attached to his motion a proof of personal service of the summons and complaint on the  
23 Defendant in the State Court litigation.<sup>1</sup> The Default Judgment recites that it "finds as to each and every  
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25 <sup>1</sup> In Defendant's Answer, he stated that he was not served with the "amended complaint" in the state  
26 court action. That may be, but is not relevant at this point. Plaintiff submitted a declaration from the

(continued...)

1 cause of action in the complaint.” Moreover, the state court necessarily decided the issue of actual fraud in  
2 its default judgment, waiving the requirement that the court make an express finding as to each element of  
3 the claim. The Default Judgment would therefore be treated as any other judgment in the California courts  
4 with regard to estoppel. As it has already been determined that the judgment satisfies the elements under  
5 § 523(a)(2)(A), the Default Judgment is therefore nondischargeable.

6 CONCLUSION

7 For the foregoing reasons, the default money judgment from the Superior Court of California for  
8 Mendocino County awarding Plaintiff damages for actual fraud is nondischargeable under 11 U.S.C.  
9 § 523(a)(2)(A).<sup>2</sup> Counsel for Plaintiff should submit an order granting summary judgment to Plaintiff and a  
10 form of judgment in favor of Plaintiff, consistent with this Memorandum Opinion.

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14 FRANK R. ALLEY, III  
15 Chief Bankruptcy Judge  
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21 <sup>1</sup> (...continued)

22 attorney who litigated the state court matter which indicates that first and second amended complaints were  
23 filed after Defendant’s default which added allegations against other defendants and substituted actual names  
24 for Doe defendants, but did not affect the allegations against Defendant.

25 <sup>2</sup> The Complaint also seeks nondischargeability under 11 U.S.C. § 523(a)(4), presumably for fraud or  
26 defalcation while acting in a fiduciary capacity. Because "fiduciary" requires an express or technical trust in  
the context of § 523(a)(4), Ragsdale v. Haller, 780 F.2d 794, 796 (9th Cir. 1986), and no findings were made  
on that issue in the state court judgment, nondischargeability will be limited to that stated.